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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ZIAD AKL, MD, FACP
Petitioner,

v.

JUDGE ALFRED SWERSKY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Rooker-Feldman doctrine bars federal courts from hearing civil rights violation and state tort claims seeking prospective declaratory relief against state court judge acting in his judicial capacity, his law clerk, and private attorneys conspiring with them to defeat Petitioner in state court proceedings, where Petitioner did not seek rejection of any state court judgment by the federal court.

2. Whether the Younger abstention doctrine bars federal courts from hearing civil rights violation and state tort claims seeking prospective declaratory relief against state court judge acting in his judicial capacity, his law clerk and private attorneys conspiring with them to defeat Petitioner in state court proceedings, where Petitioner did not and could not have adequate opportunity to raise his civil rights violation claims in the same state court that was conspiring against him, and where there were no ongoing state court proceedings of the nature brought in federal court.

3. Whether declaratory relief sought by Petitioner that judge violated his civil rights is retrospective in nature and therefore barred by the doctrine of judicial immunity, where such relief was sought in order to obtain adjudication of concurrent claims against co-conspirators of judge.

4. Whether judicial immunity bars civil rights violation and state tort claims against law clerk sued in her individual capacity, where law clerk merely carried her ministerial duties.

5. Whether the Equal Protection Clause constitutes the basis for civil conspiracy claims under 42 U.S.C. §§1983 and 1985(3) when brought by a "class of one" against attorneys who conspired with state court judge and his law clerk to defeat Petitioner in state court.

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceedings in the court below:

Petitioner:
ZIAD AKL, MD, FACP

Respondents:
JUDGE ALFRED SWERSKY
SARAH HALEY, ESQ.
DEBORAH BAUM, ESQ.
KAREN-FAYE MCTAVISH, ESQ.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDING..... iii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... vii

I. INTRODUCTION..... 1

II. OPINIONS AND ORDERS BELOW..... 2

III. JURISDICTION..... 3

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 4

V. STATEMENT OF THE FACTS..... 7

VI. ARGUMENT..... 12

VII. REASONS WHY THIS PETITION SHOULD BE GRANTED..... 31

1. A Federal Court Of Appeals Has Decided Important Questions Of Federal Law In A Manner That Conflicts With Relevant Decisions By This Court and With Relevant Decisions By The Third, Fifth, Sixth, Seventh And Ninth Circuit Courts Of Appeal..... 31
2. A Federal Court Of Appeals Has Decided Important Questions Of Federal Law That Have Not Been, But Should Be, Settled By This Court..... 32
3. Without This Court's Intervention, Petitioner Has No Remedy At Law Against The State Court Conspiracy..... 33
4. There Is A Reasonable Probability That At Least Four Members Of This Court Would Conclude That This Case Warrants Plenary Consideration..... 34

VIII. CONCLUSION..... 35

Transcript of motions hearing before the Honorable Leonie M. Brinkema, United States District Judge..... A- 1

Order dated November 17, 2006, entered by the District Court, dismissing Petitioner's suit..... A-10

Judgment dated November 17, 2006, entered by the District Court, dismissing Petitioner's suit..... A-11

Order dated December 22, 2006, entered by the District Court, denying Petitioner's motion for reconsideration of final judgment..... A-12

Memorandum opinion dated December 22, 2006, issued by the District Court denying Petitioner's motion for reconsideration of final judgment..... A-13

Judgment dated June 26, 2007, entered by the Fourth Circuit Court of Appeals, affirming the District Court's decision..... A-29

Memorandum opinion dated June 26, 2007, issued by the Fourth Circuit Court of Appeals, affirming for the reasons stated by the District Court..... A-30

Mandate of the Fourth Circuit Court of Appeals..... A-32

TABLE OF AUTHORITIES

Page No.

- Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989)..... 29
- Bonner v. Circuit Court of St. Louis, 526 F.2d 1331 (8th Cir. 1975)..... 31
- Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974)..... 31
- Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385 (4th Cir. 2004).....13
- Casa Marie, Inc. v. Superior Court, 988 F.2d 252, (1st Cir. 1993)..... 18
- Catz v. Chalker, 142 F.3d 279 (6th Cir. 1998).. ..... 15, 32
- Centifanti v. Nix, 865 F.2d 1422 (3d Cir. 1989) 19
- Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)..... 29
- Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)..... 24
- Cruz v. Beto, 405 U.S. 319 (1972)..... 31
- Daniels v. Warden of the Red Onion State Prison, 266 Va. 399 (2003)..... 10
- Dennis v. Sparks, 449 U.S. 24 (1980)..... ..... 11, 12, 13, 15, 16, 18, 24, 25, 32, 34
- Ernst v. Child & Youth Services of Chester Cty., 108 F.3d 486, (3d Cir. 1997)..... 17
- Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005).... 11, 21, 22, 31, 32
- Federal Ins. Co. v. Starr Elec. Co., 242 Va. 459, (1991)..... 10
- GASH Associates v. Village of Rosemont, 995 F.2d 726 (7th Cir. 1993) 20, 22

- Haines v. Kerner, 404 U.S. 519 (1972)..... 31
- Horton v. Horton, 254 Va. 111, (1997)..... 10
- Hurley v. Bennett, 163 Va. 241, (1934)..... 10
- Kimes v. Stone, 84 F.3d 1121 (9th Cir., 1996).. ..... 11, 12, 13, 15, 16, 25, 32
- Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994)... ..... 18, 19, 20
- McCray v. State of Maryland, 456 F.2d 1 (4th Cir. 1972)..... 28
- Mitchum v. Foster, 407 U.S. 225 (1972)..... 33
- Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)..... 24
- Nesses v. Shepard, 68 F.3d 1003 (7th Cir. 1995).....11, 13, 14, 15, 16, 20, 22, 23, 25, 32
- Patsy v. Board of Regents, 457 U.S. 496 (1982) 22
- Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)..... 19
- Pulliam v. Allen, 466 U.S. 522 (1984)..... 14, 15, 33, 34
- Schall v. Joyce, 885 F.2d 101 (3d Cir. 1989)... 24
- Shallow v. Rogers, 201 Fed. Appx. 901 (2006)..... 14, 32
- Sindram v. Suda, 986 F.2d 1459 (D.C. Cir. 1993) 27, 28
- Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) 29
- Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979)..... 11, 15, 21
- Spencer v. Steinman, 968 F. Supp. 1011 (E.D. Pa. 1997)..... 16, 18, 20
- Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918)..... 29
- Village of Willowbrook v. Olech, 528 U.S. 562

(2000)..... 29
- Wilkinson v. Dotson, 544 U.S. 74 (2005).... 22

Pursuant to the Rules of the Supreme Court of the United States, Petitioner Ziad Akl, MD, FACP, respectfully petitions this Honorable Court for a writ of certiorari to the Fourth Circuit Court of Appeals. The decision below involves important federal questions that conflict with relevant decisions of this Court and with relevant decisions of the Third, Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeal. It also involves important questions of federal law that have not been, but should be, settled by this Court. The decisions below misapply the Rooker-Feldman, Younger, and judicial immunity doctrines and prevent plaintiffs suing state court judges for prospective declaratory relief, their law clerks, and private attorneys conspiring with the aforementioned from bringing independent civil rights violation claims where the plaintiffs do not seek rejection of any state court decision.

I. INTRODUCTION

This matter arises out of events that took place in the years 2003-2004 at Virginia Hospital Center-Arlington (the "Hospital"), located in Arlington, Virginia. The Hospital administration and medical staff, lured by an unscrupulous attorney who was confident that Petitioner would not bring legal action, revoked Petitioner's medical staff appointment through a forged and fraudulent peer-review, committing several felonies and misdemeanors under Virginia and federal laws. After Petitioner filed suit in the Arlington County Circuit Court (the "Arlington Court"), the Hospital attorney was fired and the Hospital entered into a conspiracy with two judges of the Arlington Court to defeat Petitioner. Despite the conspirators' efforts and the

court's obstructive tactics to discovery, Petitioner was able to prove that the peer-review process was the product of fraud and forgery. However, as it was clear to Petitioner that there was an extra-judicial agreement between the Arlington Court and the Hospital that the case would be dismissed on summary judgment, Petitioner nonsuited his case with the intent to re-file it in federal court and filed a complaint with the Virginia Judicial Inquiry and Review Commission against the state court judge, Alfred Swersky, followed by a lawsuit against him, his law clerk and the Hospital's counsel in the United States District Court for the Eastern District of Virginia, Alexandria Division (the "District Court"). The result was a retaliatory act by a second judge of the Arlington Court who entered "sanctions" against Petitioner in the amount of $616,114.14. The District Court dismissed Petitioner's suit under various theories and the decision was affirmed by the Fourth Circuit Court of Appeals. This petition urges reversal of the judgment of the District Court as the decision clearly conflicts with relevant decisions of this Court and with relevant decisions of the Third, Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeal and prevents victims of state judicial conspiracies from seeking federal relief.

II. OPINIONS AND ORDERS BELOW

- Order dated November 17, 2006, entered by the District Court, dismissing Petitioner's suit (Appendix at 10).
- Judgment dated November 17, 2006, entered by the District Court, dismissing Petitioner's suit (Appendix at 11).
- Order dated December 22, 2006, entered by the

District Court, denying Petitioner's motion for reconsideration of final judgment (Appendix at 12).

- Memorandum opinion dated December 22, 2006, issued by the District Court denying Petitioner's motion for reconsideration of final judgment (Appendix at 13).
- Judgment dated June 26, 2007, entered by the Fourth Circuit Court of Appeals, affirming the District Court's decision (Appendix at 29).
- Memorandum opinion dated June 26, 2007, issued by the Fourth Circuit Court of Appeals, affirming for the reasons stated by the District Court (Appendix at 30).

III. JURISDICTION

Petitioner seeks review of the Fourth Circuit Court of Appeals' decision, entered on June 26, 2007, affirming the District Court's dismissal of Petitioner's suit. This Court has jurisdiction to review the decision of a Court of Appeals by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; 28 U.S.C. §1254(1). Accordingly, the questions presented in this petition plainly fall within the jurisdiction of this Court.

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. The proceedings in the District Court have been concluded with the entry of the order denying Petitioner's motion for reconsideration of final judgment and the Fourth Circuit Court of Appeals affirmed the decisions of the District Court on June 26, 2007 and entered its mandate on July 18, 2007

(Appendix at 32). On September 17, 2007, this Court extended the time to file this petition until November 23, 2007 (App. 07A228). Thus, this petition is timely.

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

- The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, §1.

- 42 U.S.C. §1983 provides, in relevant part, that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

- 42 U.S.C. §1985(3) provides, in relevant part, that if two or more persons in any State or Territory conspire or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws..... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

- Pursuant to Va. Code Ann. §18.2-499, any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever ... shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under §18.2-500.

- Pursuant to Va. Code Ann. §18.2-500, any person who shall be injured in his reputation, trade, business or profession by reason of a violation of §18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and

without limiting the generality of the term, "damages" shall include loss of profits.

- Va. Code §8.01-380 provides, in relevant part that only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits.

- Va. Code §8.01-271.1 provides, in pertinent part, that the signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading,

motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

V. STATEMENT OF THE FACTS

Petitioner is a Board-certified physician specializing in Internal Medicine and Infectious Diseases, licensed to practice Medicine in Virginia, the District of Columbia and Maryland. Petitioner's medical staff appointment to Virginia Hospital Center-Arlington (the "Hospital") was revoked in July 2004 after a malicious, forged and fraudulent peer-review was undertaken of him.

On November 17, 2004, Petitioner filed, through counsel, a lawsuit in the Arlington County Circuit Court against the Hospital and seven individuals followed by a lawsuit *pro se* against two nurses in the Fairfax County Circuit Court and another lawsuit *pro se* against his previous employer for conspiring with the Hospital. The lawsuits were consolidated by the Arlington Court after the second lawsuit was transferred there by order of the Fairfax County Circuit Court upon motion by the defendants.

During the proceedings, Petitioner uncovered a large number of facts that pointed towards a concerted effort by numerous individuals to

maliciously terminate his medical staff appointment at the Hospital, defame him and terminate his career as a physician. Petitioner also uncovered a conspiracy by way of which Judge Alfred Swersky, his law clerk and Hospital counsel aimed at defeating Petitioner and allowing the Hospital and its co-defendants to prevail. Judge Alfred Swersky, a retired judge from the Alexandria County Circuit Court acting as a substitute judge at the Arlington Court, presided over most hearings and appointed himself presiding judge over Petitioner's trial. Over the next two years after the filing of Petitioner's first lawsuit, it became clear that Judge Swersky was unable and unwilling to stand at equal distance from the parties, was consistently ruling in favor of the defendants contrary to evidence and law, was continuously obstructing discovery, was continuously communicating *ex parte* with the defendants and their counsel and promised them to dismiss the case on summary judgment. After conferring with the Virginia Judicial Inquiry and Review Commission, Petitioner filed, on July 17, 2006, a motion to recuse Judge Swersky on the basis of a conspiracy between him and the defendants and moved to nonsuit his pending claims pursuant to Va. Code §8.01-380. In response, Respondents moved the court for award of costs incurred in defending these matters pursuant to a contract between Petitioner and the Hospital. Alternatively, Respondents moved the court to award the Hospital the fees incurred as a sanction against Petitioner pursuant to Va. Code §8.01-271.1, purporting that the lawsuits themselves were filed by Petitioner "to harass and needlessly cause Defendants to expend significant sums defending the baseless allegations."

After Judge Swersky expressed his intention to deny Petitioner's motion to recuse and to enter sanctions against Petitioner, Petitioner filed, on August 21, 2006, a lawsuit against him, his law clerk (Sarah Haley), and the defendants' counsel (Deborah Baum and Karen-Faye McTavish) in the District Court for (1) denial of due process under 42 U.S.C. §1983; (2) deprivation of the equal protection of the laws under 42 U.S.C. §1983; (3) conspiracy to violate civil rights under 42 U.S.C. §§1983 and 1985(3); (4) fraud; (5) intentional infliction of emotional distress; and (6) civil conspiracy under the Virginia Business Conspiracy Act, Va Code Ann. §§18.2-499 *et seq.* Petitioner sought prospective declaratory relief against all respondents and monetary damages against respondents Haley, Baum and McTavish. After being served with Petitioner's Complaint against him, Judge Swersky allegedly recused himself without ever issuing any order to that effect. At a hearing held on October 2, 2006 at the Arlington Court, Judge Benjamin Kendrick denied Petitioner's motion to transfer venue, which alleged bias by the court, and awarded the Hospital $616,114.41 in costs incurred in the defense of the actions relating to Petitioner's clinical privileges. The monetary judgment was allegedly based on a contract between Petitioner and the Hospital in which Petitioner agreed to reimburse the Hospital for the costs incurred in defending lawsuits arising from the termination of his medical privileges if he did not prevail. However, the merits of the case were never reached, a breach of contract claim was pending before the court and the case was nonsuited prior to the end of discovery. This judgment was entered in violation of previous Virginia Supreme Court decisions since the effect of a first voluntary nonsuit

pursuant to Va. Code §8.01-380 is to put an end to a case without prejudice and without a decision on the merits. Daniels v. Warden of the Red Onion State Prison, 266 Va. 399, 402 (2003). In addition, a party who commits the first breach of a contract is not entitled to enforce the contract. Horton v. Horton, 254 Va. 111, 115 (1997) (citing Federal Ins. Co. v. Starr Elec. Co., 242 Va. 459, 468 (1991); Hurley v. Bennett, 163 Va. 241, 253 (1934)). Since the court did not reach the merits of the case, it could not rule that the Hospital was entitled to enforce the contract when Petitioner was alleging that the Hospital committed serious and malicious breaches of the contract and submitted overwhelming evidence in support of his contention. The court even awarded the Hospital the costs of defending a lawsuit *filed in federal court* against a previous employee and a physician who had participated in the peer-review process.

On September 18, 2006, Respondents Swersky and Haley, through counsel, filed a motion to dismiss this matter under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Similarly, on September 20, 2006, Respondents Baum and McTavish filed, through counsel, a motion to dismiss this matter under Fed. R. Civ. P. 12(b)(6). On October 18, 2006, appointed Judge Gerald Lee recused himself from the proceedings in the District Court. On October 30, 2006, Magistrate Judge Barry Poretz did likewise.

A hearing on the motions to dismiss was held on November 17, 2006, at which Petitioner was not given the opportunity to present arguments. Judge Leonie Brinkema, who dismissed the matter, stated

that "no matter how you want to phrase it, you're asking this court to enter a judgment that essentially would vacate or undermine the state court proceedings" and that "no matter how you title or package your pleading, you are really asking this Court to sit as an appellate court on the state court proceedings, and there is absolutely no law that supports that approach, and it would be an absolute violation of the whole concept of federalism, where the federal courts in most cases abstain from interfering in ongoing state court proceedings." (Appendix at 6). The District Court added that the caselaw that Petitioner submitted in support of his approach and which was "reviewed carefully" by the Court arose out of criminal proceedings. However, none of the cases submitted by Petitioner arose out of criminal proceedings and all cases showed that federal courts can hear civil rights claims against judges and their co-conspirators as long as the plaintiff does not seek rejection of the state court judgment. See Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979); aff'd by a unanimous Supreme Court in Dennis v. Sparks, 449 U.S. 24 (1980); Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996); Nesses v. Shepard, 68 F.3d 1003 (7th Cir. 1995). See also Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (stating that the Rooker-Feldman doctrine operates only in a narrow set of circumstances, namely: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments). The Court's legal theory signifies that judges, their law clerks and private co-conspirators can not be sued for civil rights violations under any circumstances.

On November 22, 2006, Petitioner filed a motion for reconsideration under Fed. R. Civ. P 60(b)(1) on the basis that the District Court made a mistake in interpreting the law and attached the aforementioned caselaw to his motion. On December 22, 2006, the District Court issued an order denying Petitioner's motion on the basis that "it merely repeats [Petitioner's] original arguments and fails to cite new precedent that would justify reconsideration of the Court's decision." (Appendix at 14). The District Court further issued a memorandum opinion in which it reiterated its position and added new theories for dismissal.

In the District Court, Petitioner raised Constitutional questions of denial of due process of law, deprivation of the equal protection of the laws, and conspiracy to do so by Respondents. In his appeal to the Fourth Circuit, Petitioner assigned errors to the dismissal of his Constitutional and state claims by the District Court, raising the same questions raised in this petition.

V. ARGUMENT

Rooker-Feldman Doctrine

The District Court held that the suit against Baum and McTavish is barred by the Rooker-Feldman doctrine, "which stands for the basic proposition that federal district courts may not sit in review of state court proceedings." (Appendix at 20). The District Court further held that neither Dennis nor Kimes, *supra*, supported Petitioner, "because the application of the Rooker-Feldman doctrine was not an issue in those cases." (Appendix at 21). The

District Court added that both Dennis and Kimes found that private attorneys are not immune from suit under §1983 and that these holdings are inapplicable to Petitioner's cause of action because Baum and McTavish did not assert that they were immune from suit, nor did Petitioner bring suit against these defendants under §1983.

Petitioner did bring his civil rights claims against Baum and McTavish under both §§1983 and 1985. Further, the section of the Code under which Petitioner brought his civil rights claims is irrelevant. Petitioner cited Dennis and Kimes to demonstrate that suits can be brought against state actors without being barred by Rooker-Feldman. Had the latter doctrine barred such suits, the abovementioned cases would not have reached the Fifth Circuit Court of Appeals and this Court, respectively, and would have been dismissed by the courts on that basis. See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 390 (4th Cir. 2004) (en banc) ("Questions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised *sua sponte* by the court.") Thus, the District Court's holding that Dennis and Kimes do not support Petitioner's approach misses the mark.

The District Court also opined that Nesses, *supra*, suggests that a plaintiff who brings a civil action under §1983, alleging that the people involved in a state court decision "violated some independent right of his, such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics," can, "without being blocked by the Rooker-

Feldman doctrine, sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm." Nesses, 68 F. 3d at 1005. The independent right asserted by Petitioner, the District Court added, "appears to be nothing more than the right to win one's lawsuit, because his due process and equal protection claims are essentially a repackaging of arguments he presented to the state court and lost, [...] in the end, his allegations before this court equate to an attack on the decisions of the state court."

The District Court again erred in so holding because Petitioner never asked the Court to reject any state court judgment; in fact, there were no judgments to reject at the time Petitioner filed the action subject of this petition. In Shallow v. Rogers, 201 Fed. Appx. 901 (3rd Cir. 2006), a judge was sued for actions taken in his judicial capacity. The court ruled that the Rooker-Feldman doctrine did not apply where the plaintiff was not complaining of a judgment by the state court, but only of an order by the court for the plaintiff to undergo psychological evaluation. Likewise, Petitioner did not complain of any judgment by the state court, but only of the conduct of the court during the legal proceedings, where the court entered into a conspiracy with Petitioner's opponents to deny him due process.

In Pulliam vs. Allen, 466 U.S. 522, this Court affirmed the award of attorney's fees against a judge by a district court that declared the judge's practice to require bond for nonincarcerable offenses a violation of due process and equal protection and

enjoined it. The Supreme Court stated:

> We remain steadfast in our conclusion ... that Congress intended §1983 to be an independent protection for federal rights and find nothing to suggest Congress intended to expand the common law-doctrine of judicial immunity to insulate state judges completely from federal collateral review.

Pulliam at 541.

It is clear that plaintiffs suffering injuries brought by conspiracies between state court judges and defendants can bring suits for civil rights violation under §1983 and recover damages. This was the case in Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979); aff'd by a unanimous Supreme Court in Dennis v. Sparks, 449 U.S. 24 (1980); Catz v. Chalker, 142 F.3d 279 (6th Cir. 1998); Nesses v. Shepard, 68 F.3d 1003 (7th Circuit 1995) and Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996), where the Fifth, Sixth, Seventh and Ninth Circuits as well as the U.S. Supreme Court held that plaintiffs can bring §1983 claims in federal courts to vindicate violations of their civil rights in state court proceedings. Such claims constitute independent causes of action aimed at vindicating distinct rights from the ones that the malicious state court proceedings were supposed to vindicate.

The Nesses court clarified:

> "Otherwise there would be no federal remedy for violation of federal rights whenever the violator so far succeeded in corrupting the state judicial process as to obtain a favorable judgment."

Nesses at 1005.

The District Court's ruling signifies that any attempt to vindicate civil rights that were violated in state courts would be equivalent to asking the federal courts to serve as appellate courts. This directly contradicts the Courts' rulings in Dennis, Kimes and Nesses. In fact, the District Court contradicts itself by holding that there is no law that supports Plaintiff's approach while conceding that equitable relief is available against judges (Appendix at 19 n 4) – equitable relief cannot be awarded if a lawsuit cannot be brought against a judge.

In Spencer v. Steinman, 968 F. Supp. 1011, 1016-17 (E.D. Pa. 1997), a case also arising out of state civil proceedings and asserting a §1983 claim, the United States District Court for the Eastern District of Pennsylvania stated, citing Nesses, *supra*:

> Shepard involved an allegation of conspiracy among lawyers and various state judges to engineer plaintiff's defeat in certain ongoing state court litigation. The gist of plaintiff's claim in Shepard was that the lawyers for his opponent in the state court litigation had used their "political clout to turn the [state] judges against him." Shepard, 68 F.3d at 1004.
>
> Chief Judge Posner, speaking for a divided panel, found that whether Rooker Feldman barred the claim depended upon whether the plaintiff was "[merely] claiming that the decision of the state court was incorrect, [and therefore] that it denied him some constitutional right," id. at 1005, or whether

plaintiff claimed that the decision violated "some independent right of his, such as a right (if it is a right) to be judged by a tribunal that is uncontaminated by politics." Id. In the former, plaintiff's claim is barred by Rooker Feldman in that plaintiff would be seeking the review of the merits of a state court decision by a lower federal court. See id. In the latter, however, it would not because in that case plaintiff would be suing "to vindicate [the independent right to be judged by a tribunal uncontaminated by politics] and would be relying on the adverse decision only to show that the violation of his rights had caused the plaintiff's harm." Id. (citation omitted). Cf. Ernst v. Child & Youth Services of Chester Cty., 108 F.3d 486, 491-92 (3d Cir. 1997) (finding that a civil rights action alleging violation of substantive due process rights was not barred by Rooker-Feldman since a finding by the federal court that the defendants violated plaintiff's right to substantive due process "would not have involved the invalidation of any conclusion or judgment [of the merits] reached by the state court.").

Chief Judge Posner further explained the requirement of pointing to the adverse decision by the state court to show injury from the conspiracy noting that, unless plaintiff did so, he could show "no harm and without harm there is no tort." Id. (citation omitted). To put it another way, reliance upon the adverse decision of the state court was necessary to show not that the state judge's decision was wrong but rather that the conspiracy between the lawyer and the state judge to obtain

favorable rulings for plaintiff's opponent in the state court litigation had caused plaintiff harm. *See* id. (citing Dennis v. Sparks, 449 U.S. 24, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980) and Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 259 (1st Cir. 1993)).

Since plaintiff in this case does not seek reversal of Judge Maier's rulings and apparently, like the plaintiff in Shepard, is pointing to the rulings of the state judge only as evidence of the harm which the alleged conspiracy caused him, the Court finds that the Rooker-Feldman doctrine does not bar his §1983 claim.

In a footnote, the Spencer Court added:

The Court finds that this conclusion is consistent with the Third Circuit's ruling in Marks v. Stinson, 19 F.3d 873, 885 n. 11 (3d Cir. 1994) where it was found that the district court was not deprived of subject matter jurisdiction under Rooker-Feldman over plaintiff's §1983 fraud and constitutional claim of election law violations as the district court in that case could decide plaintiff's §1983 action "without disturbing the prior state court rulings." Id.

In Marks, 19 F.3d at 885 n. 11, the Third Circuit Court of Appeals stated:

[T]he [district] court was not barred under Rooker-Feldman from hearing the constitutional and fraud claims of Marks and the Republican State Committee ("RSC") because these claims had not been determined

by the state court, nor were they inextricably intertwined with a prior state court decision. Specifically, the court of common pleas dismissed Marks' and the RSC's claims without reaching the merits. Therefore, the district court was not faced with a situation where it was asked to review a determination of the state court. Furthermore, a "federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment." Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989) (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987) (concurring opinion)). Here, the district court could (and did) find that Marks' and the RSC's fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings. Id.

Finally, Rooker-Feldman did not bar the district court from hearing the claims of plaintiffs Steck and Lorenzo, the Election Contest petitioners. Because the court of common pleas did not reach the merits of their claims, the district court did not sit in review when it heard them. Nor are the claims of Steck and Lorenzo inextricably intertwined with the state court's decision to dismiss because the district court need not reverse this

decision before granting Steck and Lorenzo federal relief. (emphasis added).

"The Rooker-Feldman doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." GASH Associates v. Village of Rosemont, 995 F.2d 726, 728 (7th Circuit, 1993).

Based on the foregoing, Petitioner's lawsuit should not be barred by the Rooker-Feldman doctrine. Petitioner did not ask the District Court to annul, reverse or declare that any judgment by the state court was wrong. Petitioner is simply seeking to redress a wrong that the participants in the state court litigation have caused him and that violated independent rights of his – the rights to due process and to the equal protection of the laws – and is suing to vindicate those rights. Like the plaintiffs in Nesses and Spencer, Petitioner is pointing to the rulings of the state court judge only as evidence of the harm which the conspiracy caused him.

Further, as in Marks, none of Petitioner's state court cases ever reached the merits, and the District Court is not faced with a situation where it is being asked to review a determination of the state court. The District Court could find merit to Petitioner's claims without also finding that the state

court rulings on the motions before it were erroneous. If Petitioner establishes, for instance, that Respondents Baum and McTavish corrupted the judicial system through bribery, the District Court can rule that Petitioner was denied due process without ruling that the state court rulings were erroneous.

As recently explicated by the Supreme Court, the Rooker-Feldman doctrine operates only in a narrow set of circumstances, namely: "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 US 280, 284 (2005). Petitioner has not requested that the District Court reject any state court judgment; he is simply attempting to vindicate an independent right, a civil right that was violated by the state court that conspired with the defendants to defeat him and that caused him an injury that is independent and additional to the one caused by the state court defendants. The District Court can decide Petitioner's claims "without disturbing the prior state court rulings." Those rulings, it should be noted, were only decisions on motions and none of Petitioner's cases reached the merits. In other words, Petitioner is not a state court loser; his cases were voluntarily dismissed prior to reaching the merits. The District Court need not review or reject any of the state court's rulings to adjudicate Petitioner's claims. As in Nesses, Petitioner claims that Respondents violated an independent right of his – the right to be judged by a tribunal that abides by

the Canons of Judicial Conduct and stands at equal distance from the parties without conspiring with the defendants to defeat Petitioner.

Rooker-Feldman does not deprive federal district courts jurisdiction over a matter that has already been litigated in state court as long as a federal plaintiff "presents some independent claim." Exxon Mobil, 125 S.Ct. at 1527 (quoting GASH Assoc., 995 F.2d at 728). Not only Petitioner is not re-litigating state claims, but his claims against Defendants are totally new ones independent from the state court claims and were never brought in state court. They are simply new and independent claims against different defendants.

Further, Rooker-Feldman does not impose a duty to exhaust judicial and administrative remedies before pursuing a federal civil rights suit. Except in prisoner suits, there is no requirement that a plaintiff in a suit under 42 U.S.C. §1983 exhaust state remedies. See Wilkinson v. Dotson, 544 U.S. 74 (2005); Patsy v. Board of Regents, 457 U.S. 496, 501, (1982).

Younger Abstention Doctrine

The District Court further held that even if Rooker-Feldman did not apply, the District Court should abstain under the Younger abstention doctrine. Citing the three elements necessary for this doctrine to apply as (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity to present the federal claims in the state proceeding, the District Court held that

Petitioner appealed every adverse state court decision and, through the appeals process, has "ample opportunity to argue that the decisions reached in the state court proceedings were garnered through the use of improper means." (Appendix at 24). The District Court again missed the mark; Petitioner's goal is not to make an argument to reverse a decision by the state court, but rather to vindicate independent claims of civil rights violation. Petitioner could not bring such claims before the Supreme Court of Virginia, nor could he file such claims in the same court that conspired to defeat him – that would undermine his claim that the court was corrupt. "Nesses' mistake was to bring his suit alleging the corruption of the tribunal in the same allegedly corrupt state court system (a mode of proceeding that casts great doubt on the good faith of his claim)." Nesses at 1005-1006.

Petitioner cannot reasonably bring the claims brought in federal court in the same court that conspired to defeat him and expect to win. There is no "adequate opportunity" in state court. Even if Petitioner has, through the appeals process, "ample opportunity to argue that the decisions reached in the state court proceedings were garnered through the use of improper means," as the District Court stated, the independent violation of his civil rights would not be vindicated, and he would have no federal remedy for violation of federal rights when the violator has so far succeeded in corrupting the state judicial process as to obtain a favorable judgment.

Further, the answer to the first question

under the Younger test is that there is no state judicial proceeding that addresses Plaintiff's independent claims brought against Respondents in federal court. Although Younger abstention is founded on notions of comity, "the [mere] pendency of an action in state court is no bar to proceedings concerning the same subject matter in the federal court having jurisdiction." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). "The presence of two parallel suits . . . does not run afoul of Younger." Schall v. Joyce, 885 F.2d 101, 112 (3d Cir. 1989). This is true even in cases where there exists a "potential for conflict in the results of adjudications." Colorado River, 424 U.S. at 816; Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Thus, the District Court erred in holding that it should abstain under Younger.

Judicial Immunity and Declaratory Relief

The District Court also held that the claims against Judge Swersky were dismissed because "[J]udges defending against §1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities," quoting Dennis at 26. Then, recognizing that Petitioner did not sue the Judge for money damages, the District Court added, in a footnote, that although judges are amenable to be sued under §1983 for declaratory relief if the relief sought is prospective, Petitioner was not seeking prospective relief.

In his Complaint, Petitioner requested that the Court enter declaratory judgment against respondents Swersky and Haley declaring that they

denied Petitioner due process, deprived him of the equal protection of the laws and conspired with respondents Baum and McTavish to deny Petitioner due process, deprive him of the equal protection of the laws and injure him in his reputation, business and profession in violation of Va. Code Ann. §18.2-499. In his opposition to the motion to dismiss filed by respondents Swersky and Haley, in a supplement thereto and in his motion for reconsideration, Petitioner argued that a declaration of conspiracy against respondents Swersky and Haley is a natural requisite and consequence of the adjudication of Petitioner's conspiracy claims since the District Court, by ruling that respondents Baum and McTavish did conspire with respondents Swersky and Haley, would be automatically ruling that the latter conspired with the former, since it takes two to conspire. Thus, the declaratory relief sought does serve an important justiciable purpose – that is to adjudicate the conspiracy claims against those respondents from whom Plaintiff can, according to Dennis, Kimes and Nesses, *supra*, recover monetary damages.

Further, Petitioner argued that such relief against respondents Swersky and Haley does serve many other purposes as follows:

- Such declaratory relief would serve the public interest in that it would help the Judicial Inquiry and Review Commission in its investigation of Petitioner's complaint against Judge Swersky and would alert the Virginia State Bar to Respondent Haley's conduct.
- Such declaratory relief would help Petitioner obtain hospital privileges. Petitioner was

denied clinical privileges at Georgetown University Hospital ("GUH") because of the revocation of his medical staff appointment at the Hospital. Petitioner was informed by GUH that a court judgment against the Hospital would make GUH reconsider that denial. Since Petitioner was unable to move forward with his state claims, his career is in jeopardy and every day that goes by brings with it irreparable injury in the form of loss of income, loss of skills, emotional distress and harm to reputation. Declaratory relief may allow Petitioner to obtain privileges at GUH and other hospitals.

- Such declaratory relief would help Petitioner obtain malpractice insurance with "standard" carriers as opposed to "high-risk" carriers without having to pay prohibitive premiums, as he has been forced to do thus far.
- Such declaratory relief would help Petitioner have the National Practitioner Data Bank void the report filed by the Hospital against Plaintiff, by obtaining an injunction requiring the NPDB to investigate the facts as required by the Privacy Act, 5 U.S.C. 552(a).
- Such declaratory relief would help Petitioner in his quest to have the notice of revocation of his medical staff appointment removed from the website of the Virginia Board of Medicine.
- Such declaratory relief would help Petitioner show "good cause" to bring his nonsuited claims in a court other than the Arlington County Circuit Court, as provided for by Va. Code §8.01-380, and avoid a transfer to the Arlington Court.

- Such declaratory relief would help Petitioner transfer venue from the Arlington Court to another court upon remand of his appealed claims to that court.
- Such declaratory relief would allow Petitioner to prove the assigned errors to the Virginia Supreme Court during his appeals of his previously dismissed claims.
- Such declaratory relief would help Petitioner prove to the Supreme Court of Virginia and any other interested body that the $616,000 "sanction" imposed on Petitioner by the Arlington Court was in retaliation for his filing this lawsuit, rather than an award of costs under a contract.
- Such declaratory relief would provide the State of Virginia with a reason to reexamine every case that Respondents Swersky and Haley were ever involved in, since they believe that all what Petitioner is entitled to in court is an opportunity to be heard, as they stated in their motion to dismiss.

Thus, as is clear from the above, Petitioner's suit against Judge Swersky seeks prospective declaratory relief and should not have been dismissed.

Judicial Immunity As Applied To Law Clerks

In its memorandum opinion, the District Court held, citing Sindram v. Suda, 986 F.2d 1459, 1460-61 (D.C. Cir. 1993), that the doctrine of judicial immunity was the reason for the dismissal of the suit against respondent Haley because "clerks, like judges, are immune from damage suits for

performance of tasks that are an integral part of the judicial process." (Appendix at 19). The District Court also held that the declaratory relief sought against respondent Haley was not prospective.

In his opposition to the motion to dismiss filed by respondents Swersky and Haley, Petitioner alleged that respondent Haley was merely carrying ministerial duties and pointed to the Fourth Circuit Court of Appeals' decision in McCray v. State of Maryland, 456 F.2d 1, 5 (4th Cir. 1972), that clerks are not immune from liability when they carry their ministerial duties. This duty, the McCray court noted, "although associated with the court system, is not quasi-judicial (meaning entailing a discretion similar to that exercised by a judge)." McCray at 4. "Those cases which pitch their result on the doctrine of judicial immunity misconceive its purpose and limited scope and misapply it to court clerks." Id. at 5. Accordingly, Sindram, relied upon by the District Court and originating from a different Circuit, was not controlling here. Thus, the District Court erred in adopting the decision of another Circuit and rejecting that of its own Circuit, holding that Respondent Haley is immune from damages liability. Similarly, because the declaratory relief sought by Petitioner against Respondent Haley was identical to that sought against Judge Swersky and was prospective in nature, as demonstrated above, the District Court erred in dismissing Respondent Haley from the suit.

Equal Protection Clause

The District Court erred in holding that Petitioner only filed his civil conspiracy claim against

Respondents Baum and McTavish under 42 U.S.C. §1985(3), when the record clearly shows that Petitioner brought his claim under both §§1983 and 1985(3).

The District Court further erred in holding that Petitioner failed to state a claim under §1985(3) because he did not allege that he belonged to a class. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The United States Supreme Court has recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See* Village of Willowbrook v. Olech, 528 U.S. 562 (2000). *See* also Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989). In so doing, the Supreme Court explained that the purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Sioux City Bridge Co. at 445 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918)).

Thus, to the extent that Petitioner must allege that he belonged to a class under §1985(3), "a class of

one" is sufficient since Petitioner alleged that Respondents Swersky and Haley denied him due process and deprived him of the equal protection of the laws based on bias and their intention to protect the state court defendants. Petitioner's Complaint clearly alleges that respondents Swersky and Haley treated Petitioner differently from his opponents in the state court cases and discriminated against him. Thus, Petitioner has alleged that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Since a "class of one" is recognized for the purposes of the Equal Protection Clause, the same class should be recognized by the federal courts for the purposes of a *conspiracy* to deprive an individual of the equal protection of the laws under §1985(3) (which provides, in relevant part, that if two or more persons ... conspire ... for the purpose of depriving ... any person or class of persons of the equal protection of the laws...). The Supreme Court could not have recognized an element for the purpose of commission of an act without recognizing the same element for the purpose of *conspiracy* to commit that same act.

Finally, even if Petitioner brought his claim solely under §1985(3) and failed to state a claim because he did not allege class-based discrimination, the District Court should have given Petitioner the opportunity to amend his Complaint and bring this count solely under §1983. A court faced with a motion to dismiss a *pro se* complaint alleging violations of civil rights must read the complaint's allegations expansively, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and take them as true for purposes of deciding whether they state a claim. Cruz v. Beto, 405 U.S.

319, 322 (1972). Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)). Therefore, the Court should have offered Petitioner an opportunity to amend his Complaint and bring the civil conspiracy claim solely under §1983.

VII. REASONS WHY THIS PETITION SHOULD BE GRANTED

1. A Federal Court Of Appeals Has Decided Important Questions Of federal Law In A Manner That Conflicts With Relevant Decisions By This Court And With Relevant Decisions By The Third, Fifth, Sixth, Seventh And Ninth Circuit Courts Of Appeal.

The Fourth Circuit Court of Appeals, by affirming the decision of the District Court for the reasons stated by the latter, has made decisions that stand in direct conflict with this Court's decision in Exxon, *supra*. In Exxon, this Court defined the elements of the Rooker-Feldman doctrine and stated that it does not apply where a plaintiff does not seek rejection of a state court judgment. Although Petitioner never sought rejection of any state court decision, the District Court held that "no matter how you want to phrase it, you're asking this court to enter a judgment that essentially would vacate or undermine the state court proceedings" and that "no matter how you title or package your pleading, you

are really asking this Court to sit as an appellate court on the state court proceedings, and there is absolutely no law that supports that approach, and it would be an absolute violation of the whole concept of federalism, where the federal courts in most cases abstain from interfering in ongoing state court proceedings."

Moreover, Dennis and Kimes, *supra*, show that plaintiffs may bring §1983 claims against judges and their co-conspirators without being barred by the Rooker-Feldman doctrine, and Nesses and Catz, *supra*, directly support Petitioner's approach. The Third Circuit has also adopted the Exxon ruling in Shallow v. Rogers, 201 Fed. Appx. 901 (3rd Cir. 2006), where a judge was sued for actions taken in his judicial capacity. Thus, the Fourth Circuit stands in conflict with the rulings of this Court and with those of the Third, Fifth, Sixth, Seventh and Ninth Circuits regarding the application of the Rooker-Feldman doctrine. Pursuant to Rules 10(a) and 10(c) of this Court, this is precisely the type of question that the Nation justifiably expects this Court authoritatively to decide.

2. A Federal Court Of Appeals Has Decided Important Questions Of Federal Law That Have Not Been, But Should Be, Settled By This Court.

The District Court held, and the Fourth Circuit affirmed, that plaintiffs such as Petitioner have an adequate opportunity to bring their civil rights claims against state courts in the same court that conspired to defeat them, and that the state appeal process can replace the right to vindicate

independent civil rights violation claims in federal court. The District Court also held that it should abstain under Younger because the state court proceedings were still ongoing, although those did not involve claims of civil rights violation against the state court.

The Fourth Circuit's decision that federal courts should abstain from hearing claims such as Petitioner's under the Younger abstention doctrine has not been settled by this Court. Further, Questions 3, 4 and 5, *supra*, have not been settled by this Court either.

3. Without This Court's Intervention, Petitioner Has No Remedy At Law Against The State Court Conspiracy.

As this Court stated in Pulliam, *supra*:

> Congress enacted §1983 and its predecessor, §2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." Mitchum v. Foster, 407 U.S. 225, 240 (1972).

Similarly here, a state court is in league with those who are bent on depriving Petitioner of his federally protected rights. The remedy provided by

Congress in §1983 is not available to Petitioner pursuant to the District Court's ruling, and the Fourth Circuit Court of Appeals affirmed. The District Court's decision signifies that Petitioner and any person subject to judicial corruption by a state court has no remedy at law for the violation of his civil rights. Without this Court's intervention, the state court in question would be free to act arbitrarily whenever it pleases, and Petitioner has no remedy at law.

4. There Is A Reasonable Probability That At Least Four Members Of This Court Would Conclude That This Case Warrants Plenary Consideration.

This Court previously reviewed cases involving judicial corruption or misconduct, and deems this issue one of major public importance. See Dennis, *supra*, and Pulliam v. Allen, 466 U.S. 522.

In Dennis, this Court recognized the importance of providing remedy to individuals such as Petitioner who suffer injuries resulting from subversion of the judicial process. Indeed, in Dennis, this Court stated:

> We agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a conspiracy between a state court and defendants to a civil litigation and their counsel, where the supreme court of the state, which only grants petitions for appeal in a discretionary manner, refused to review the matter, and the lower federal courts have declined to redress grievance.

VIII. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals.

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Pro se

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ZIAD AKL, M.D., F.A.C.P.,
Plaintiff,

Civil Action No.
1:06cv964

vs.

JUDGE ALFRED SWERSKY;
SARAH HALEY, ESQ.;
DEBORAH BAUM, ESQ.;
and KAREN-FAYE McTAVISH, ESQ.;
Defendants.

Alexandria, Virginia
November 17, 2006
10:00 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Pages 1 - 9)

COMPUTERIZED TRANSCRIPTION OF
STENOGRAPHIC NOTES

ALSO PRESENT:	DEBORAH BAUM, ESQ. SARAH HALEY, ESQ.
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

PROCEEDINGS

THE CLERK: Civil Action 2006-964, Ziad Akl v. Judge Alfred Swersky. Will counsel please note their appearance for the record.

THE COURT: Good morning. Dr. Akl, you're here?

DR. AKL: Yes. Yes, Your Honor.

THE COURT: Representing yourself, right?

DR. AKL: Yes, Your Honor.

THE COURT: All right. Have a seat over here on the left, please.

MR. INGOLD: Good morning, Your Honor. Jim Ingold, Senior Assistant Attorney General in the Attorney General's Office of the Commonwealth of Virginia, on behalf of defendants Judge Swersky and Law Clerk Sarah Haley.

THE COURT: Good morning.

MR. CYNAMON: Good morning, Your Honor. David Cynamon along with Matthew Anzaldi here representing defendants Deborah Baum and Karen-Faye McTavish, and Ms. Baum is also here with us in court.

THE COURT: All right. This matter comes before the Court on the motions to dismiss filed by all defendants. There are two separate motions to dismiss, but they both – all defendants have filed motions to dismiss the complaint, and what I want to know, counsel, is what the status of the state litigation is at this point. My understanding is that Dr. Akl has been involved in litigation in the state courts and that there are certain appeals pending at the present time. I'd like to know where they are at the present time, if you know.

MR. INGOLD: They are pending before the Virginia

Supreme Court is my understanding, Your Honor. I don't know if the codefendants or Dr. Akl --

THE COURT: I'll let everybody address that issue in a second. Is that your understanding as well, Mr. Cynamon?

MR. CYNAMON: Yes, Your Honor. Dr. Akl has filed petitions to appeal to the Virginia Supreme Court in both the consolidated cases which we have been referring to as Akl I, II, and III, and also petition to appeal in Akl V, I guess, is the other Virginia case, and in addition, the court -- the state court imposed sanctions and an injunction against Dr. Akl from filing --

THE COURT: Judge Kendrick's decision?

MR. CYNAMON: Judge Kendrick's decision, that's correct. The only thing remaining there is Dr. Akl was permitted to nonsuit his remaining claims in Akls I, II, and III, and therefore still has the option to file those preexisting claims but no new claims.

THE COURT: All right. Now, Dr. Akl, do you agree that that's the status of the appeals at this point?

DR. AKL: I would like to clarify, Your Honor. There was a case filed here, also, that's being appealed to the circuit court. The nonsuited cases have been appealed. The petition has not been filed yet. The Akl V matter was appealed. A petition was filed. No hearing has been conducted yet.

THE COURT: All right. Now, the difficulty with this case is, as you know, in the case involving Judge Swersky and Ms. Haley, what you have done is to have sued a state court judge and his law clerk under various theories, including conspiracy and violation of due process rights that you might have. As you yourself acknowledge, a judge and the judge's immediate staff are normally immune from any kind

of a lawsuit involving a claim for damages if the allegations are related to the judge's official duties, which in this case, everything you've alleged is connected with the litigation that you had in state court.

You then, recognizing that you could not get damages, revised or refined your theory, saying that you're simply seeking injunctive relief, that is, a declaration as to the conduct of Judge Swersky and his law clerk, correct?

DR. AKL: No, Your Honor. I never asked for damages against Judge Swersky.

THE COURT: All right. But your point is you're suing Judge Swersky in this case not for damages but for declaratory relief.

DR. AKL: Exactly.

THE COURT: The difficulty you have with that -- and the defendants are correct in their evaluation of the law -- is that you are asking, no matter how you want to phrase it, you're asking this Court to enter a judgment that essentially would vacate or undermine the state court proceedings. You're asking this Court to say that Judge Swersky denied you due process, committed such error as to essentially make the state court adjudication vulnerable. And so the problem you have and the thrust of the defendants' arguments as to those two defendants is that no matter how you title or package your pleading, you are really asking this Court to sit as an appellate court on the state court proceedings, and there is absolutely no law that supports that approach, and it would be an absolute violation of the whole concept of federalism, where the federal courts in most cases abstain from interfering in ongoing state court proceedings. Now, some of the cases that you've

relied upon, because we've looked at them carefully and you need to look at them again perhaps, come out of the criminal context, which is an exception to some degree to that rule, and that is, if a person is convicted in a state court, there is a federal habeas process review which does after the prisoner has fully exhausted, so you can't just hop from a state court conviction into federal court on habeas, you have to go through the entire appellate route within the state system plus their habeas route, and then you can come over to the federal courts, and the law -- and this comes down from the Supreme Court; it's not just made here in Virginia -- in terms of getting habeas corpus review in the federal system of state court criminal matters is extremely restricted. The federal courts do not sit to second-guess the state courts, and it's only basically if the Virginia Supreme Court has actually violated a Supreme Court of the United States' decision, in other words, it's ruled contrary to established law by the Supreme Court of the United States or has made findings of fact that would be contrary to how they should be found given Supreme Court precedent, it's that narrow, all right? And so the problem you have here, some of the cases you've cited come out of section 1983 and 1985, but if you look at the facts of the cases upon which you1re relying, those are criminal cases. Even though they're civil, 1983 is a civil cause of action, they're brought by prisoners, state prisoners seeking some sort of federal review. The bottom line for all this discussion is that the law that has been cited in the briefs by Judge Swersky and his law clerk is absolutely the correct law, and as a matter of law, this Court cannot consider any of your claims against those individuals. You currently have pending in state court a review of the underlying civil

proceedings, and there is -- that is the route you have to take. So if you think there's been a due process violation in the course of the adjudication of your state cases, you have to raise those issues in your state appeals. This Court cannot hear them, and so I'm granting the motion of defendants Swersky and Haley for those reasons. You have similar problems with the suit against the remaining two defendants, because again, you are essentially asking the Court by looking at the performance of those attorneys and representing the defendants in ongoing -- in the civil litigation, to again second-guess the way in which those cases were litigated. Those attorneys have also raised in their motion for summary -- motion to dismiss the same types of issues about federal courts abstaining from involvement in civil -- state civil proceedings, and the reasons that they have presented similarly are overwhelming. There simply is no law that supports the types of claims that you're trying to bring in this court at this time. So I recognize that you are pro se, but you're obviously a very intelligent pro se litigant, and you've done a lot of research into the law, but your arguments do not have legal merit. So I'm granting both motions to dismiss for these reasons. Thank you.

And you have a right to appeal this decision. If you're going to file an appeal, your time period to notice the appeal is 30 days from today's date. You simply can file the notice of appeal downstairs in the Clerk's Office.

Thank you.

DR. AKL: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ Anneliese J Thomson

Anneliese J Thomson

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZIAD AKL
Plaintiff, 1:06cv964

vs.

JUDGE ALFRED SWERSKY, et
al.
Defendants.

ORDER

For the reasons stated in open court, defendants Judge Alfred Swersky and Sarah Haley's Motion to Dismiss is GRANTED and defendants Deborah Baum and Karen-Faye McTavish's Motion to Dismiss is GRANTED. Accordingly, it is hereby

ORDERED that the Clerk enter judgment in favor of the defendants pursuant to Fed. R. Civ. P. 58.

The Clerk is directed to forward copies of this Order to counsel of record and plaintiff, pro se.

Entered this 17th day of November. 2006.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
Unite States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZIAD AKL
Plaintiff, 1:06cv964

vs.

JUDGE ALFRED SWERSKY, et
al.
Defendants.

JUDGMENT

Pursuant to the order of this Court entered on November 17, 2006, and in accordance with federal Rules of Civil Procedure 58, Plaintiff's complaint is Dismissed. JUDGMENT is hereby entered in favor of the Defendants Judge Alfred Swersky, Sarah Haley, Deborah Baum, and
Karen -Faye McTavish.

Fernando Galindo, Acting Clerk

/s/ __ Gillespie

By _____
Deputy Clerk

Alexandria, Virginia
November 17, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ZIAD AKL
Plaintiff, 1:06cv964

vs.

JUDGE ALFRED SWERSKY, et al.
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration of Final Judgment is DENIED.

The Clerk is directed to forward copies of this Order and the accompanying Memorandum Opinion to counsel of record and plaintiff, pro se.

Entered this 22nd day of December, 2006.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
Unite States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZIAD AKL
Plaintiff, 1:06cv964

vs.

JUDGE ALFRED SWERSKY, et al.
Defendants.

MEMORANDUM OPINION

Before the Court is the pro se plaintiff, Ziad Akl ("Akl")'s, Motion for Reconsideration of Final Judgment ("Motion for Reconsideration"), in which he seeks reconsideration, under Fed. R. Civ. P. 54(a) and 60(b) (1), of the Court's November 17, 2006, Order granting the defendants' motions to dismiss. A motion for reconsideration under Fed. R. Civ. P. 60(b)[1] is not authorized when it is nothing more than a request for the district court to change its mind. Lee X v. Casey, 771 F. Supp.725, 728 (E.D. Va. 1991). Indeed, to merit reconsideration, a motion must be

[1] Fed. R. Civ. P. 60(b) (1) provides, inter alia, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect...." Fed. R. Civ. P. 54 (a) defines "judgment" as including "a decree and any order from which an appeal lies."

timely and premised on a meritorious position, an absence of prejudice to the opposing party, and exceptional circumstances. Werner v. Carbo, 731 F.2d 204, 206-07 (4th Cir. 1984). Although timely, Akl's motion does not satisfy the other requirements for reconsideration. For the reasons discussed below, the Court finds that the Motion for Reconsideration should be denied because it merely repeats Akl's original arguments and fails to cite new precedent that would justify reconsideration of the Court's decision. See Natural Resources Defense Counsel v. U.S. Environmental Protection Agency, 806 F. Supp. 1263, 1266 n.3 (E.D. Va. 1992), aff'd, 16 F.3d 1395 (4th Cir. 1993).

BACKGROUND

This federal civil action arises out of the numerous state court lawsuits filed by Akl, beginning on November 17, 2004, in Arlington County, when Akl sued the Virginia Hospital CenterArlington and seven individuals, alleging wrongful termination of his appointment to the medical staff of the Hospital. On March 3, 2005, he filed suit in Fairfax County Circuit Court against Laura Pederson and MarIana Pleger, alleging that their false accusations of harassment led to his medical appointment being terminated. On April 26, 2005, Akl sued Dr. Robert Holman, his former employer, alleging defamation and conspiracy with the defendants named in the previous civil actions.

These cases were consolidated before the Arlington County Circuit Court on September 26, 2005 (the "consolidated matters") After extensive discovery, including Akl taking nineteen depositions,

numerous claims were dismissed by the presiding judge, Alfred Swersky, on demurrers, leaving only a breach of contract claim against the Hospital and defamation claims against the individual defendants. On July 21, 2006, Akl requested a non-suit of all of his claims in the consolidated matters on the grounds that "Judge Swersky was unable and unwilling to stand at equal distance from the parties, was consistently ruling in favor of the defendants contrary to the evidence, was continuously communicating ex parte with [Baum and McTavish][2] and promised them to dismiss the case on summary judgment." Pl. Opp'n to Defts. Swersky and Haley's Mot. to Dismiss at 5. Akl's request for a non-suit as to the remaining breach of contract and defamation claims was granted, but the non-suit did not apply to the previously dismissed claims. On October 2, 2006, Judge Kendrick of the Arlington County Circuit Court granted the defendants' motion for sanctions against Akl, awarding $616,114.41 to the defendants, pursuant to express contract terms signed by Akl and Va. Code Ann. §8.01-271.1 (Virginia's equivalent to Fed. R. Civ. P. 11).[3]

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[2] Deborah Baum and Karen-Faye McTavish represented, and continue to represent, all of the defendants in Akl's previous suits. They are also defendants in this civil action.

[3] In so ruling, the court stated that Akl "has violated the very nature and basis for which [Virginia Code 8.01-271.1] was designed and implemented. The fees sought are, in the opinion of this Court, fair and reasonable when you consider the time spent, the degree of difficulty, and the nature of the work along with the prevailing rates for attorneys who practice in this Northern Virginia area." Pl. Opp'n to Defts. Swersky and Haley's Mot. to Dismiss, Ex. 1 at 31.

While these claims were pending in state court, on March 10, 2006, Akl filed a civil action in this court against two other individuals connected to the peer review process. On June 7, 2006, Judge Hilton granted the defendants' motions to dismiss. That decision was affirmed by the Fourth Circuit on November 27, 2006.

On May 3, 2006, Akl filed another civil action in Arlington County Circuit Court against the Virginia Hospital Center-Arlington and twenty-eight individuals who he alleged were involved in a conspiracy to terminate his medical staff appointment. Judge Swersky dismissed the complaint on the defendants' demurrer and denied plaintiff leave to amend. A petition for appeal was filed with the Virginia Supreme Court and was denied on December 11, 2006.

PRESENT CASE

On August 21, 2006, Akl filed the instant complaint in which he alleges that Baum and McTavish entered into a conspiracy with Judge Swersky and his law clerk Sarah Haley to obtain rulings favorable to the defendants in the state court cases, in contradiction to the evidence before the court. The alleged conspiracy involved numerous ex parte communications, scheming to ensure that Judge Swersky heard the matters, ruling contrary to the evidence, allowing Baum and McTavish to draft proposed orders, and allowing forged evidence to be presented. A representative sample of Akl's allegations in the complaint include:

- ¶48: After the commencement of the actions, [Baum and McTavish] entered into an extra-

judicial agreement and a conspiracy with Swersky and Haley to obtain favorable rulings, in spite of the evidence, in order to prevail in the litigation.

- ¶49: [Baum and McTavish] made several ex parte communications with Swerksy.
- ¶63: [Baum and McTavish] asked Haley to set certain motions to be heard by Swersky without such written request and without informing Plaintiff of such a request.
- ¶64: Haley did transmit [Baum and McTavish's] ex parte requests to Swersky.
- ¶65: Swersky accepted [Baum and McTavish's] requests, knowing that they were made ex parte.
- ¶66: Swersky repeatedly ruled contrary to the evidence in favor of the defendants in the Consolidated Matters in order to protect them from the financial, social and criminal consequences of an unfavorable ruling.
- ¶67: Swersky's decisions were contrary to the evidence, blatantly unfair, devoid of reason and made in bad faith and with malice.
- ¶69: Swersky repeatedly asked [Baum and McTavish] to draft orders on Plaintiff's motions so as to give them the opportunity to manipulate the language of the orders to the fullest benefit of their clients.
- ¶76: Swersky dismissed Plaintiff's claims of tortuous interference with economic relationships, intentional infliction of emotional distress and civil and statutory conspiracy for no just cause, in bad faith and with malice.
- ¶91: [Baum and McTavish], in an ex parte communication with Judge Swersky,

submitted to Swersky two different versions of orders dismissing some of Plaintiff's claims for Swersky "to choose from": one with the term "with prejudice" and one without that term.

- ¶101: In January 2006, [Baum and McTavish] and Swersky entered into an extra-judicial agreement to force a trial date upon Plaintiff, to deprive him of his right to a jury trial and to have Swersky preside as judge so he could continue hearing all motions and continue ruling in Counsel's favor.

In a six count complaint, Akl sought declaratory relief against all four defendants and compensatory and punitive damages against Haley, Baum, and McTavish. Counts I and II were brought under 42 U.S.C. §1983, alleging that Judge Swersky and his law clerk Haley violated Akl's right to due process and equal protection. Count III was a claim against all four defendants, alleging a conspiracy to violate his constitutional rights under 42 U.S.C. §1985(3). The remaining counts in the complaint consisted of allegations against all of the defendants under Virginia state law, including fraud (Count IV), intentional
infliction of emotional distress (Count V), and civil conspiracy (Count VI).

DISCUSSION

Two separate motions to dismiss were brought. Judge Swersky and Haley brought a motion based on the doctrine of judicial immunity, Younger abstention, and failure to state a claim. Defendants Baum and McTavish's motion was based on the application of the Rooker-Feldman doctrine and plaintiff's failure to state a claim.

A hearing was held on both motions to dismiss on November 17, 2006. Judge Swersky and Haley's motion was granted, by an oral ruling from the bench, based on the doctrine of judicial immunity. See Dennis v. Sparks, 449 U.S. 24, 26 (1980) ("'[J]udges defending against §1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.'") (quoting Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734-35 (1980). This doctrine was similarly applied to Judge Swersky's law clerk Haley. See Sindram v. Suda, 986 F.2d 1459, 1460-61 (D.C. Cir. 1993) ("[W]e now adopt the holding of numerous other circuits that clerks, like judges, are immune from damage suits for performance of tasks that are an integral part of the judicial process.").[4] For these reasons, and the reasons stated in open court on November 17, 2006, Akl's Motion for Reconsideration is denied as to these defendants.

As to defendants Baum and McTavish, Akl's Motion for Reconsideration has also failed to present exceptional circumstances warranting relief and

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[4] Akl suggests in his Motion for Reconsideration that he is merely seeking declaratory relief against these defendants, which he suggests "is a natural consequence of the adjudication of the claims against Defendants Baum and McTavish." Motion for Reconsideration at 3. The availability of declaratory relief against judicial officers, however, is limited to prospective relief. See Wilner v. Frey, 421 F. Supp. 2d 913, 926 (E.D. Va. 2006) (stating that to the extent the plaintiffs requested injunctive and declaratory relief against a judicial officer under the ruling of Pulliam v. Allen, 466 U.S. 522, 541-42 (1984), that decision "clearly applies only to prospective relief" and was not controlling). Because Akl does not seek prospective relief, this aspect of his Motion for Reconsideration is similarly denied.

merely repeats arguments previously made. However, the Court will take this opportunity to clarify its position regarding dismissal and provide further reasoning.

The Court granted Baum and McTavish's motion to dismiss on the grounds that plaintiff failed to state a claim upon which relief could be granted and on the basis of the Rooker-Feldman doctrine, which stands for the basic proposition that federal district courts may not sit in review of state court proceedings.[5]

In his initial opposition to the motion to dismiss and in this Motion for Reconsideration, Akl

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[5] The Rooker-Feldman doctrine grew out of its namesakes, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). The doctrine, as modified by Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), applies "when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." Davani v. Virginia Dept. of Transp., 434 F.3d 712, 713 (4th Cir. 2006). Thus,

> A claim seeking redress for an injury caused by the state-court decision itself - even if the basis of the claim was not asserted to the state court - asks the federal district court to conduct an appellate review of the state-court decision. Exxon clarifies, however, that [28 U.S.C.] §1257(a) provides that only the Supreme Court may review state-court decisions.

Id. at 718. However, "[i]f a federal plaintiff presents an independent claim, even one that denies a state court's legal conclusion in a case to which the plaintiff was a party, there is jurisdiction and state law determines whether the defendant prevails under preclusion principles." Exxon Mobile Corp., 544 U.S. at 282.

relies on Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979), aff'd Dennis v. Sparks, 449 U.S. 24 (1980), Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996), and Nesses v. Shepard, 68 F.3d 1003 (7th Cir. 1995), to support his assertion that he has sufficiently alleged an infringement of an independent right capable of being redressed by this court.

Neither Dennis v. Sparks nor Kimes v. Stone support Akl, however, because the application of the Rooker-Feldman doctrine was not an issue in those cases. In Dennis, the Court concluded that "private parties who corruptly conspire with a judge in connection with such conduct" are acting under color of state law within the meaning of §1983 and are amenable to being sued under that statute. 449 U.S. at 30. Kimes held that "state immunity does not govern federal §1983 claims and the common law did not provide immunity to private attorneys conspiring with a judge to deprive someone of their constitutional rights." 84 F.3d 1128. Thus, both Dennis and Kimes found that private attorneys are not immune from suit under §1983. These holdings are inapplicable to Akl's cause of action because Baum and McTavish did not assert that they were immune from suit, nor did Akl bring suit against these defendants under §1983.

The one case that does contemplate the type of action brought by Akl is Nesses v. Shepard. Nesses suggests that a plaintiff who brings a civil action under §1983, alleging that the people involved in a state court decision

> violated some independent right of his, such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics, can, without being blocked by the Rooker-

> Feldman doctrine, sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm.

68 F.3d at 1005.[6]

The independent right asserted by Akl appears to be nothing more than the right to win one's lawsuit, because his due process and equal protection claims are essentially a repackaging of arguments he presented to the state court and lost. Akl's conclusory allegations simply do not articulate an independent right, nor do they constitute an independent claim, capable of being redressed by this court. In the end, his allegations before this court equate to an attack on the decisions of the state court. Thus,

> It is clear from the allegations of the Complaint ... that the Plaintiff[] seek[s] to

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[6] Nesses was decided on res judicata grounds, not the application of the Rooker-Feldman doctrine. For this reason, some courts have considered the exception to the Rooker-Feldman doctrine outlined above as dicta. See Cain v. Ryan, 171 F. Supp. 2d 813, 820 (N.D. Ill. 2001) ("Although Nesses has not been overruled, subsequent opinions from the Seventh Circuit have implicitly rejected Judge Posner's thesis, that if the plaintiff alleges that the state-court judgment resulted from the violation of an 'independent right,' Rooker-Feldman is inapplicable."); Walker v. New York, 345 F. Supp. 2d 283, 292 (E.D.N.Y. 2004) ("Nesses was decided on the basis of res judicata, not Rooker-Feldman. The language cited by Plaintiff is thus dicta, and need not govern this decision. Moreover, the Second Circuit has never adopted Nesses or its reasoning, and Nesses thus need not be applied in the present case to prevent application of Rooker-Feldman.") (internal citations omitted).

> have this court review the adverse state result simply because [he] [is] unsatisfied with the result, even though an appeal remains pending in the state system. . . . For what are presumably obvious reasons, a federal court does not have jurisdiction to act in direct review of a state court decision.

Friday v. Commonwealth of Va., 2001 U.S. Dist. LEXIS 9896 (E.D. Va. 2001) (unpublished opinion) (citing Rooker and Feldman).[7] See also Snyder-Falkinham v. Stockburger, 1996 WL 1171800, *5 (W.D. Va. 1996) (unpublished opinion) ("The Rooker-Feldman doctrine is a necessary component of our federalism. An unsuccessful, disgruntled plaintiff may not, therefore, simply repackage allegations, call them due process violations, allege complicity with the state's highest court, and thereby gain access to the United States District Court."). For these reasons, Rooker-Feldman is applicable, and compels dismissal of the complaint.

Even if Rooker-Feldman did not apply, Akl's complaint would still have to be dismissed. Akl admits that the state proceedings were ongoing at the time he brought this civil action, inasmuch as he had appealed every adverse decision. As the Court told Akl during the hearing of defendants' motions to dismiss, "if you think there's been a due process violation in the course of the adjudication of your state cases, you have to raise those issues in your state appeals. This Court cannot hear them." This

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[7] Because the Court is citing to unpublished decisions, the Court has attached copies of these decisions to this Memorandum Opinion.

was a reference to the principle of abstention under Younger v. Harris, 401 U.S. 37 (1971), and its progeny. Younger abstention is appropriate where (1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity to present the federal claims in the state proceeding. Employers Resource Management Co., Inc. v. Shannon, 65 F.3d 1126, 1134-35 (4th Cir. 1995). All of these factors are present in this civil action. First, Akl appealed every adverse state court decision. Second, Akl's allegations involve the ethical proprieties of a state judge, his law clerk, and lawyers appearing before the state. Although conclusory in nature, these allegations obviously involve important state interests.

Finally, Akl, through the appeals process, has ample opportunity to argue that the decisions reached in the state court proceedings were garnered through the use of improper means.[8] Younger abstention is therefore appropriately applied in this case.

As a third reason for dismissal of the complaint against Baum and McTavish, it is clear that Akl did not adequately allege a federal cause of action against these defendants. The only federal

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[8] The Court recognizes that the Virginia Supreme Court denied Akl's appeal as to the May 3, 2006, civil action while the Motion for Reconsideration was pending before the Court. However, at the time the civil action was brought in this court, all of Akl's state court appeals remained viable. Therefore, abstention is still appropriate.

claim involving these defendants was a claim under 42 U.S.C. §1985(3), alleging that all four defendants conspired to deny him due process and the equal protection of the laws.

As the Fourth Circuit recognized in Simmons v. Poe, 47 F.3d 1370 (4th Cir. 1995),

> The law is well settled that to establish a sufficient cause of action for "conspiracy to deny equal protection of the laws" under section 1985(3), a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Id. at 1376-77. Although the Equal Protection Clause prohibits intentional discrimination against a "class of one," see Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), and §1983 provides a remedy for such a violation, it does not follow that §1985(3) provides for the same cause of action and remedy. To recover under §1985(3), a plaintiff must establish the existence of a conspiracy and show "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Akl, however, has not alleged in any respect that the defendants were "motivated by a specific class-based, invidiously discriminatory animus." To the contrary, Akl has merely asserted that he is a "class of one" and entitled to protection. Because Akl

has not alleged that the defendants were motivated by any qualifying class-based animus, his claim fails as a matter of law and dismissal is proper. See C & H Co. v. Richardson, 78 Fed. Appx. 894, 901-02 (4th Cir. 2003) (unpublished opinion) (holding that the district court properly granted summary judgment on the plaintiff's §1985(3) claim where the plaintiff did not allege that the discrimination was the result of membership in any qualifying class).

The remaining counts in Akl's complaint allege violations of Virginia state law. Each of these counts was dismissed for failure to state a claim. Akl conceded in his opposition brief to the motion to dismiss that he did not adequately allege fraud and requested permission to amend his complaint. Such an amendment was denied because amendment would have been futile. In Virginia, actual fraud is defined as "the knowing misrepresentation of a material fact to another person, whose reasonable reliance on the misrepresentation results in damage." A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 672 (4th Cir. 1986) (citing Packard Norfolk, Inc. v. Miller, 198 Va. 557 (1956). Akl could not have reasonably relied on the statements of opposing counsel in an adversarial context. Thus, the count was dismissed.

Akl also failed to allege the necessary elements to sustain his intentional infliction of emotional distress claim in Count V. To state a claim for intentional infliction of emotional distress, a disfavored tort in Virginia, see Ruth v. Fletcher, 237 Va. 366 (1989), a plaintiff must allege that, "the wrongdoer's conduct is intentional or reckless; the conduct is outrageous and intolerable; the alleged

wrongful conduct and emotional distress are causally connected; and, the distress is severe." Russo v. White, 241 Va. 23, 26, (1991) (citing Womack v. Eldridge, 215 Va. 338, 342 (1974)). In deciding whether the conduct of a defendant is "outrageous and intolerable," "it is insufficient for a defendant to have acted with an intent which is tortious or even criminal. Even if ... conduct can be characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort, the requirement ... has not been satisfied." Russo, 241 Va. at 28. Akl's allegations regarding Baum and McTavish's litigation tactics do not rise to this level. Lastly, the only allegations regarding Akl's emotional distress are that he "suffered extreme pain and emotional distress" and that he sought medical treatment as a result. These allegations are insufficient to support a cause of action. See id. (allegations that plaintiff was "nervous, could not sleep, experienced stress and 'its physical symptoms, withdrew from activities, and was unable to concentrate at work" are insufficient to withstand demurrer). Therefore, the claim was dismissed.

Lastly, in Count VI, Akl alleged that Baum and McTavish engaged in a civil conspiracy that injured him in his reputation, business, and profession, in violation of Va. Code Ann. §§18.2499 and 18.2-500. More specifically, Akl's complaint alleges that the two attorney defendants' success in defeating his state court litigation resulted in Akl not having his medical privileges reinstated. However, "these allegations fail to state a claim for relief under Va. Code §18.2-499, because as construed that statute addresses only injuries to one's business, not injuries to one's employemnt [sic] interests." Jordan

v. Hudson, 690 F. Supp. 502, 507 (E.D. Va. 1988). federal courts in Virginia "have consistently held that a right of action is afforded [under these statutes] only when malicious conduct is directed at one's business, not one's person, and that the statute focuses upon conduct directed at property, i.e., one's business, and applies only to conspiracies resulting in business-related damages." Id. (citing Federated Graphics Companies. Inc. v. Napotnik, 424 F. Supp. 291, 293-94 (E.D. Va. 1976) and Nationwide Mutual Fire Insurance Co. v. Jones, 577 F. Supp. 968, 969-70 (W.D. Va. 1984). The claim was thus dismissed.

CONCLUSION

For these reasons, and the reasons stated in open court on November 17, 2006, plaintiff's Motion for Reconsideration will be DENIED.

An appropriate Order will be issued with this Memorandum Opinion.

Entered this 22nd day of December, 2006.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
Unite States District Judge

Alexandria, Virginia

JUDGMENT

FILED: June 26, 2007

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 07-1017
1:06-cv-00964-LMB

ZIAD AKL
Plaintiff - Appellant
v.
ALFRED D. SWERSKY; SARAH HALEY; DEBORAH BAUM; KAREN-FAYE MCTAVISH
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1017

ZIAD AKL,

Plaintiff - Appellant,

versus

ALFRED D. SWERSKY; SARAH HALEY; DEBORAH BAUM; KAREN-FAYE MCTAVISH,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:06-cv-00964-LMB)

Submitted: June 21, 2007 Decided: June 26, 2007

Before NIEMEYER, WILLIAMS, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Ziad Akl, Appellant Pro Se. James Van Ingold, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Jack McKay, PILLSBURY, WINTHROP, SHAW & PITTMAN, LLP, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ziad Akl appeals the district court's orders granting the Defendants' motion to dismiss this civil action, and denying the subsequent motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Akl v. Swersky, No. 1:06-cv- 00964-LMB (E.D. Va. filed Nov. 17, 2006 & entered Nov. 20, 2006; filed Dec. 22, 2006 & entered Dec. 26, 2006). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 18, 2007

No. 07-1017
1:06-cv-00964-LMB

ZIAD AKL,

Plaintiff - Appellant,

versus

ALFRED D. SWERSKY; SARAH HALEY; DEBORAH BAUM; KAREN-FAYE MCTAVISH,

Defendants - Appellees.

MANDATE

The judgment of this Court, entered 6/26/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK